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No. 10-446

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IN THE

Supreme Court of the United States

CHARLES E. KERCHNER, JR., et al.,

Petitioners,

v.

BARACK HUSSEIN OBAMA, II, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICUS CURIAE* WESTERN CENTER FOR JOURNALISM IN SUPPORT OF PETITIONERS

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MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONERS

Amicus curiae Western Center for Journalism, respectfully, moves for leave of Court to file the accompanying brief under Supreme Court Rule 37.3(b). Counsel for Petitioners has withheld consent; counsel for Respondent has consented to the filing of this brief.

STATEMENT OF INTEREST

Founded in 1991 by Joseph Farah and James H. Smith, the Western Center for Journalism has been sponsoring investigative journalism for over eighteen years.

Today, the Center is led by columnist and veteran broadcaster Floyd Brown. The Western Center for Journalism is a vigorous watchdog that keeps a check on government abuse and the media. The Center believes strongly in open public debate. It also believes that informed public debate requires quality journalism and reporting.

The Center is working to provide quality journalism and reporting by exposing bias and falsehoods in the mainstream media so that accurate information on important issues will be available to the public. The Western Center for Journalism website covers a wide variety of topics, from media bias, to media industry news and articles about online news sources and the impact of "citizen journalists".

In addition, the Center trains individuals to become "Citizen Journalists" and bloggers. These individuals are provided with technical training and practical advice on quality reporting and commentary.

The issue of a candidate for President of the United States not being required to conclusively prove his or her birth status is of great concern to Amicus because if determinations of eligibility are left to the political branches of government to decide, or to the political parties, then this will lead to candidates who clearly fail to meet the requirements of eligibility being elected to office simply because of their popularity, and there needs to be clear guidelines regarding proof of birth status as it pertains to eligibility to run for and serve in various elected positions.

For these reasons, amicus curiae respectfully requests that the Court grant leave to file this brief.

November 3, 2010.

Respectfully Submitted,

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BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER[1]

SUMMARY OF ARGUMENT

BECAUSE OF THE IMPORTANCE OF THE OFFICE OF PRESIDENT OF THE UNITED STATES, THE QUESTION OF ELIGIBILITY TO RUN FOR AND SERVE IN THE OFFICE CANNOT BE LEFT TO THE POLITICAL BRANCHES OF THE GOVERNMENT, OR TO THE POLITICAL PARTIES, SINCE THE POLITICAL BRANCHES AND/OR THE POLITICAL PARTIES MAY HAVE AN INTEREST IN APPROVING A NON-ELIGIBLE CANDIDATE, AND, IF THIS ISSUE IS LEFT UNRESOLVED, IT COULD LIKELY RESULT IN MORE INELIGIBLE PERSONS SEEKING THE OFFICE AND RECURRING LITIGATION AS A RESULT.

INTRODUCTION

Amicus brings the following arguments in support of Petitioner's writ of certiorari, based on *Drake, et al. v. Obama, et al.*, 9th Circuit Case No. C062321 (C.D. Cal. filed January 20, 2009), a case currently pending before the U. S. Ninth Circuit Court of Appeals, which

1. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have been given appropriate notice of amicus curie's intention to file this brief. The petitioners have refused and the consent of the respondents is being lodged herewith.

addresses issues related to those raised by Petitioner concerning Barack Hussein Obama's eligibility to serve in the office of President of the United States.

ARGUMENT

I. QUESTIONS OF ELIGIBILITY ARE NOT POLITICAL QUESTIONS, BECAUSE POLITICAL BODIES, AND/OR POLITICAL PARTIES, MAY HAVE AN INTEREST IN APPROVING A NON-ELIGIBLE CANDIDATE

Federal law allows Congress to resolve questions regarding the vote of a Presidential Elector (3 U.S.C. § 15), but this is a remedy limited to problems with Electors and does not extend to the eligibility of a candidate, as 3 U.S.C. § 15 only allows for objections regarding "any vote or paper from the State." Since this action is a dispute over the eligibility of Barack Obama for the office of President of the United States, and not a dispute over whether the Electors properly cast their vote, this statute does not apply to the underlying issue at hand.

In addition, a provision of the Constitution may not be disregarded by means of a popular vote of the people, as there are specific guidelines for amending the Constitution of the United States. In order to do so, the U.S. Constitution, Article 5, requires a two-thirds vote of both houses of Congress and ratification by three-fourths of all State legislatures in the United States (U.S. Constitution. Article 5). Even if the people of the United States voted to elect as President a candidate who did not qualify for the position, that vote would not be sufficient to overcome the Constitutional

requirements for office and make that candidate eligible. Once a name is placed on a ballot, voters are only concerned with whether they prefer one candidate over another candidate, as it can be rightfully inferred by said voters that the threshold issue of eligibility has already been determined by virtue of the candidate names having been placed on the ballot. Additionally, the candidates for the Office of President of the United States are not required to prove any eligibility issues to the voters at all, and, instead, candidates are tasked with convincing the voters to vote for that particular candidate over the other candidates. Because voters can and do vote for candidates that are liked by the voters, even if those candidates may not be eligible for the position, the voters do not have the power, or the right, to determine the eligibility of a candidate. For the Court to hold otherwise would be to strip all candidates not winning a majority of the votes cast of all political power, as the laws would be based upon the whims of the majority of voters, rather than on the Rule of Law.

Furthermore, the Electoral College is not empowered with the authority to determine the eligibility of any candidate for President. In twenty-six States and the District of Columbia, Presidential Electors are prohibited by statute from voting in variance with their pledges, or the votes of a majority of the voters in their State or District, or, if they do, they face civil and/or criminal penalties and fines. The act of determining eligibility is one that requires discretionary authority, so that a candidate found to be ineligible may be removed or precluded from placement on the ballot. However, any discretionary authority of

the majority of the States' Presidential Electors has been removed by statute, and the Presidential Electors, instead, perform a ministerial function of casting their votes in accordance with the popular vote of the State that each Elector represents. Any assertion that the Electoral College has the authority to make any determination of a Presidential candidate's eligibility to serve in the office is unpersuasive, because, while the historical intent of the of the Electoral College was to allow for such determinations, the modern majority trend of the States is to limit the duties of the Presidential Electors to the ministerial role of casting a vote for the candidate chosen by the popular vote of their respective States or District. For these reasons, the ministerial power to determine and/or exclude a candidate's eligibility is not found within the Electoral College.

Finally, political boards, committees, and panels, in general, such as the United States Congress, are not proper bodies for making determinations of eligibility in this situation because of the significant risk of "corrupt and partisan action" (*Irby v. Barrett* (AK, 1942) 163 S.W.2d 512, 514). Matters committed by the Constitution to the non-judicial branches of the Federal Government are political in nature. *Baker v. Carr* (1962) 369 U.S. 186, 211. Thus, the Office of President of the United States is designed to decide political issues. In like manner, the United States Congress is a political body with the power to legislate political matters. In addition to its political powers, Congress has internal rules concerning whether to seat or remove their own members, but these rules do not extend to eligibility of candidates for the Office of President of the United

States. Since both the Congress and the President are political bodies, any Congressional authority to determine whether a candidate meets the requirements for the Office of President would be suspect, as the determinations would depend on which political party was in the majority at the time. A related issue was considered by Court in *Irby v. Barrett*, which held:

"If the Chairman and Secretary of the Committee have the right to say that because of the decision of this court petitioner is ineligible to be a candidate for office, they may also say, in any case, that for some other reason a candidate is ineligible. For instance, it has been held by this court in many election contests that one must pay his poll tax; that he must do so after proper assessment in the time and manner required by law, and that otherwise he is not eligible even to vote, and unless he were a voter he could not hold office. So with other qualifications, such as residence. May this question be considered or decided by the Chairman and Secretary of the Committee? It may be that such power can be conferred upon them by laws of this State or the rules of the party; but it is certain that this has not yet been done. If this can be done, and should be done, the door would be opened wide for corrupt and partisan action. It might be certified that a prospective candidate has sufficiently complied with the laws of the State and the rules of a political party to become a candidate, and, upon further consideration, that holding might be recalled; and this might be done before that action could be reviewed in a court of competent jurisdiction and reversed in time for the candidate to have his name placed on the ticket. It would afford small satisfaction if, after the ticket had been printed with the name of

the candidate omitted, to have a holding by the court that the name should not have been omitted." (*Irby v. Barrett* (AK, 1942) 163 S.W.2d 512, 514).

Since the Office of President of the United States is the most powerful position in the country, the risk of "corrupt and partisan action" is great if the authority to determine eligibility is placed in the hands of those who are likely to gain an advantage over their opposing political parties. Given this risk, the proper remedy for eligibility disputes is to bring such disputes to the Court for a determination, rather than to Congress or to the Electoral College, and this Court has the power to make determinations of fact and law regarding controversies over the eligibility of a political candidate with little likelihood of partisan results. For all these reasons, the issue of a candidate's eligibility is not a political question, the Court may properly make a determination on this issue, and this Court should grant Petitioner's writ of certiorari.

II. THE QUESTION OF VERIFYING THE ELIGIBILITY OF A CANDIDATE FOR PRESIDENT OF THE UNITED STATES, IF LEFT UNRESOLVED, COULD LIKELY RESULT IN MORE INELIGIBLE PERSONS SEEKING THE OFFICE, AND RECURRING LITIGATION OVER THE ISSUE

This is a matter of first impression. There is no governmental authority tasked with verifying whether a Candidate for the President of the United States is, in fact, a natural born citizen, as required by the United States Constitution, Article 2.

Amicus requests that this Court resolve the current issue of who has the authority to verify that a Presidential candidate meets the Constitutionally required eligibility requirements, as there remains a question as to whether absurd results may occur unless this Court so determines. Arnold Schwarzenegger is well known as having been born in Austria. If there are no means of compelling verification of a Presidential candidate's birth status, and no court has the power to do so, Mr. Schwarzenegger could run for, and be elected, President of the United States, as there are, according to Respondents, no means of demanding compliance with the Constitutional requirements for the position. Further, if the Libertarian Party were to nominate the late Ayn Rand as their candidate for President, could she be removed from the ballot on the grounds that she is not a natural born citizen of the United States? Finally, if the current Prime Minister of the United Kingdom, David Cameron, were to be nominated by a political party to run for the office of President of the United States, could he do so on the grounds that there is no one with the authority to verify his status as required under Article 2 of the U.S. Constitution. Because of the strong potential of further abuses and absurd results, as well as recurring litigation on the issue, *Amicus* respectfully request that this Court grant Petitioner's writ of certiorari.

CONCLUSION

As discussed above, this matter is not a political question outside this Court's jurisdiction to hear. Article 2 of the U.S. Constitution sets forth the minimum requirements for a candidate for the office of President of the United States, for which there now are, according to Respondents, no standards or bodies authorized to make any determination of eligibility. Lacking such may result in clearly ineligible persons being elected in the future unless this issue is resolved by this Court. For these reasons, *Amicus* respectfully request that this Court grant Petitioner's writ of certiorari.

Respectfully Submitted,

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